(7)

No. 96-553

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK et ano.,

Petitioner,

- against -

BETTY LOUISE FELTON, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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REPLY BRIEF

This brief is submitted in reply to the brief submitted in opposition to our petition by respondents Betty Louise Felton, et al. It is submitted that nothing in respondents' submission indicates that the Court should not review the order of the Court of Appeals, but indeed underscores the propriety of plenary review by this Court.

(1)

Respondents urge that the writ should be denied because the matter is being presented to the Court through an inappropriate procedure. Resp. Br., p. 12. The Respondents incorporate by reference a more fully developed argument made in their cross-petition. As we believe the argument is properly raised in opposition to our petition, we address it here.

It is our position that we properly sought relief from the District Court's 1985 judgment which contains an

injunction effectuating the holding of the Court in Aguilar v. Felton, 473 U.S. 402 (1985). App., pp. A22-26. In light of the unique circumstance that a majority of the Court has stated that they wished to reconsider the holding in Aguilar, see Board of Education of Kiryas Joel v. Grumet, __ U.S. __, 114 S. Ct. 2481, at 2418, 2505, 2515 (1994), it is submitted that a Rule 60(b) motion is appropriate; that rule specifically provides for relief from a judgment when "it is no longer equitable that the judgment have prospective application." F.R.C.P. 60(b)(5). Such judicial authority is particularly appropriate for institutional litigation such as here, where a significant change in circumstances has occurred. Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 383-84 (1992)(consent decree). It is submitted that such changed circumstances are present here.

Respondents' "floodgates" argument that the granting of relief to petitioners will result in a rash of 60(b)

motions in cases where this Court has decided an issue by a vote of 5 to 4 simply raises false fears. This is not an ordinary case, finally resolving a private dispute. Rather, it involves a judgment which, absent modification, would for all time control the manner in which a public institution may provide services authorized by Congress, on a dubious constitutional principle. Furthermore, the suggestion that the issue should await resolution in some other litigation would lead to an absurd result. The petitioners' school district is the largest in the Title 1 program, and the City of New York has substantial parochial school systems with large numbers of children eligible for Title 1 services. The record of its past and present manner of delivering Title 1 services to parochial school students would provide the best backdrop for reconsideration of Aguilar. In any event, as noted by the Secretary of Education, another case raising the issue seems well off in the future. For example, in

Helms v. Cody, 856 F.Supp. 1102 (E.D. La., 1994), as of the date of this brief a motion for reconsideration remains pending in the District Court.

Assuming that the Court believes there is some question as to whether the petitioners followed the proper procedure, we submit that this should not result in a denial of our petition, but rather the Court should require full briefing of the issue on the merits.

(2)

Respondents present no convincing reason why the Court should not reconsider the holding in Aguilar, especially where a majority of the Court has already indicated their desire for such reconsideration. Indeed respondents apparently feel constrained not to defend the holding in Aguilar, but focus on the holding in the companion case of School District of Grand Rapids v. Ball, 473 U.S. 373 (1985). Resp. Br. in Opp., pp. 16-20.

While reconsideration of Aguilar would necessarily encompass a reconsideration of Grand Rapids, at least one of the state programs at issue in that case was factually and legally distinct from the Title 1 program involved in Aguilar. Grand Rapids, pp. 398-400 (O'Connor concurring as to invalidation of Grand Rapids' "Community Education" program). Respondents' reliance on that case merely confirms the need for reconsideration of both cases.

Respondents do raise some factual assertions concerning the Title 1 program in New York to which we must specifically reply. They point to 20 U.S.C. § 6314(B) which authorizes the use of federal funds for school-wide programs. This is not a new part of the Title 1 program, as respondents appear to assert, since Congress has specifically authorized such school-wide programs since 1978, prior to Aguilar. See, P.L. 95-561, § 133, 92 Stat. 2176. In any event, such optional programs have been used

by a number of public schools in New York City, but they have never been used as a method of providing Title 1 services to parochial school students. The Nowasad Declaration cited by Respondents (Resp. Br. in Opp., p. 7) was speaking only of the use of such programs by public schools. Similarly the reference in the Nowasad Declaration to a "push-in" method of providing Title 1 services referred only to its use in public schools. Cross-Petition, pp. 24-25.

Respondents also belittle the financial burden of complying with Aguilar. As we informed the Court in our petition, for 1995/96, almost six million dollars, which might otherwise provide pedagogical services for all the City's eligible students, were taken "off-the-top" to comply with Aguilar. Respondents' assertion that this is a mere "episodic" loss of special funding misses the mark. Respondents fail to appreciate that in a time of scarce

governmental resources, it is an unwise use of such resources to provide inferior educational services, all to comply with the dubious constitutional mandates of Aguilar. Furthermore, we have never "minimized" the financial burden of complying with Aguilar. Resp. Br. in Opp., p. 19. Rather, in an action in the District Court attacking the constitutionality of the Board's present Title 1 program, in which Respondents' counsel was lead counsel, plaintiffs urged that the petitioner was violating the Establishment Clause by financially favoring parochial over public school students. Committee for Public Education and Religious Liberty v. Secretary, United States Department of Education, 88 Civ. 96 (E.D.N.Y.) ("the Pearl litigation"). The cited language (Resp. Br., p. 10), a response to the plaintiffs' statistical analysis, was merely an attempt to show that the cost of complying with Aguilar was

proportionately a small part of the entire Title 1 program in New York City.

Respondents also appear to find some constitutional relevance in the fact that almost all the non-public schools in which students receive Title 1 assistance are religiously-affiliated schools. Brief in Opp., p. 21. Respondents fail to inform the Court that many of those students are not of the same religious faith as the schools they attend; in some of New York City's Catholic schools attended by students receiving Title 1 services, the percentage of student enrollment that is non-Catholic ranges from 50% to 85%. Joint Appendix to Court of Appeals, p. A553. Students receive Title 1 assistance because of their economic and educational disadvantages, not because of the religious nature of the schools they attend.

(3)

Respondents do not convincingly show that the subject litigation is an inappropriate vehicle for reconsideration of Aguilar. Rather, it provides the best vehicle for such reconsideration. The record contains both the Joint Appendix in Aguilar, which lays out the Board's substantial experience in providing on-site services, and extensive factual material as to the operation of the post-. Aguilar, off-site program. Respondents' claim that the record is inadequate and that there should be a remand for a further hearing is a mere attempt at delay. In the Pearl litigation, to which Respondents' counsel makes frequent reference (Resp. Br. in Opp., pp. 1, 7; Cross-Petition, pp. 4, 14, 24), a constitutional attack was brought against the present program of providing Title 1 Services in New York. In that action, Respondents' counsel was given broad discovery as to the operation of the Board's Program. In

submitting an affirmation with attached exhibits on our 60(b) motion which encompassed approximately 80 pages of the Joint Appendix to the Court of Appeals, counsel for Respondents presumably submitted the documentation which he felt was relevant to the application.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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December 9, 1996

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